TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 40

MORTIMER MATTHEWS, PLAINTIFF IN ERROR,

vs.

LOUIS J. HUWE, AS TREASURER OF HAMILTON COUNTY, OHIO

IN ERROR TO THE COURT OF APPEALS FOR THE FIRST JUDICIAL DISTRICT OF THE STATE OF OHIO

FILED FEBRUARY 28, 1935

(30,145)

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[fol. 1] **IN COURT OF APPEALS OF THE FIRST JUDICIAL DISTRICT OF OHIO, HAMILTON COUNTY, OHIO**

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ I, herewith, transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, in the city of Cincinnati, this fourteenth day of February, A. D., 1924.

Geo. W. Tibbles, Clerk of the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, by Albert Swing, Deputy Clerk. (Seal of the Court of Appeals, First Appellate District, Ohio.)

[fol. 2] [File endorsement omitted]

IN COURT OF APPEALS OF THE FIRST JUDICIAL DISTRICT OF OHIO, HAMILTON COUNTY, OHIO

No. 2010

MARIANNA MATTHEWS, Plaintiff,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio, Defendant

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed Jan. 24, 1924

Now comes Mortimer Matthews, plaintiff, and alleges that he brought this suit in the Court of Common Pleas, to enjoin said defendant from collecting certain assessments, upon the same, alleged constitutional grounds, as hereinafter set forth, and others, and that, upon the trial de novo of this cause, upon appeal in this court, final judgment was rendered in favor of the plaintiff enjoining only such interest upon the deferred payments of said assessments as was in excess of six (6%) per cent, but holding as against the plaintiff that the County Commissioners of Hamilton County, Ohio, were authorized to levy said assessments upon the property in question; that their proceedings were had in conformity to law; and that the assessments, except said excess interest, were valid; and that the plaintiff was not entitled to the further injunction for which he prayed.

The Plaintiff further alleges that said judgment was rendered on the 25th day of April 1923; and that on the 24th day of May 1923, he brought, as of right, in the Supreme Court of Ohio, pro-
[fol. 3] ceedings in error thereto, upon the same alleged constitutional grounds, as hereinafter set forth, and others; and that on the fourth day of December, 1923, his said proceedings in error were dismissed by the Supreme Court of Ohio upon the sole ground, that the said alleged grounds were not debatable Constitutional questions, and that consequently it did not have jurisdiction to hear said cause. The said judgment of this Court, being therefore that of the highest Court of law or equity in the state of Ohio, having jurisdiction thereof, has held and adjudged, that the levy of said assessments by said County Commissioners, by their resolution and proceedings, upon the plaintiff's real estate, under that part of the Act of the General Assembly of the state of Ohio, 106 Ohio Laws 574 (637), Sec. 207, and amended 107 Ohio Laws 69 (129), which is now section 1214 of the General Code of the state of Ohio, is not, and that said section itself, as so construed by said holding and judgment of this Court, is not, in violation of, and repugnant to, the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

In said ruling and judgment said Court of Appeals erred to the prejudice of the plaintiff, all of which appears in the record, opinion and final judgment of said Court of Appeals, described as aforesaid, and remanding this cause to said Court of Common Pleas to carry the same into execution.

[fol. 4] Wherefore your petitioner prays for an allowance of a Writ of Error from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, and the judges thereof, to the end that the record in this case may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected, and said judgment modified, and said cause remanded for further proceedings; and your petitioner will ever pray.

Mortimer Matthews, Plaintiff—In His Own Person.

The Writ of Error as prayed for in the foregoing petition is hereby allowed this 24th day of January, 1924, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Two Hundred ($200.00) Dollars.

Dated at the City of Cincinnati, Ohio, this 24th day of January, 1924.

Wade Cushing, Presiding Judge of the Court of Appeals of the First Judicial District of the State of Ohio.

[fol. 5] [File endorsement omitted]

IN COURT OF APPEALS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 24, 1924

Now comes the plaintiff, in connection with the petition for a writ of error herein, and respectfully submits that in the record, proceedings, decision and final judgment, of the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, in the above entitled action there is manifest error in this to-wit:

The Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, erred, in that it rendered judgment for the plaintiff, enjoining certain excess interest only, upon deferred payments of the assessments complained of, and in that it refused to render judgment for the plaintiff, enjoining the entire amount of said assessments, as being repugnant to, and in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, which declares that no state shall deprive any person of prop-
[fol. 6] erty without due process of laws.

Said error consisted in so construing that part of the Act of the General Assembly of the State of Ohio, 106 Ohio Laws 574 (637), Sec. 207, and amended 107 Ohio Laws 69 (129), now section 1214 of the General Code of the state of Ohio, which required the County Commissioners of Hamilton County to levy the assessments complained of, upon an apportionment, according to the benefits accruing to the lands assessed within one-half mile of either side of the improvement, as to hold, that the said County Commissioners were authorized to levy said assessments, that their proceedings were had in conformity to law, and that said assessments were valid, notwithstanding the fact, that said County Commissioners, ostensibly proceeding to make or direct an apportionment according to benefits, nevertheless actually directed the plainly arbitrary division of the amount to be assessed into three equal parts, one of which they assessed against all the property abutting upon the improvement in proportion to the number of front feet contained in each part, parcel, tract and lot abutting thereon, another, upon all the property within one-half mile of both sides thereof in proportion to its acreage or area, and the third upon all the said property in proportion to the tax valuation of each part, parcel, tract, and lot involved, (including the tax valuation of building thereon) as the same appears on the tax duplicate of Hamilton County.

Said repugnancy and conflict consist in the following particulars:

First. The plaintiff's lands, which were assessed, lie and abut upon a county road approximately parallel with the improvement, throughout the entire length of both, and lie, in a direct line, within one-half mile of, but do not abut upon the improvement, nor upon

any connecting road, within one-half mile by such road, whereas other assessed lands, not abutting upon the improvement, nor upon [fol. 7] said parallel county road, abut upon other connecting roads at a very much shorter distance from said improvement, or have access thereto, over other abutting lands of the same owner, at very much shorter distances. As the apportionment above described omitted to take into account either the factor of direct distance, or that of distance of access, which are those, without which no valuation of relative benefits could have been made, as between the plaintiff's lands and said other assessed lands not abutting upon the improvement, but lying much nearer and having much nearer access thereto, said assessments and their justification under said section 1214, result in the deprivation of the plaintiff of his property without due process of law.

Second. Some of the plaintiff's property, more distant, as it is, than other non-abutting and also abutting property, was of higher tax valuation, and had upon it buildings of much greater tax valuation than some of either of the latter. It was upon a wrong and plainly arbitrary principle, and a deprivation of the plaintiff of his property without due process of law, to include, as a factor in the valuation of relative benefits, in a definite inflexible ratio, either the value of bare land, or buildings, without reference to distance, whether direct, or by means of access, or the value of buildings, at all, as a part of the value of lands.

[fol. 8] Third. All of the plaintiff's property abutting, as it did and does, upon a County Road approximately parallel to the improvement throughout the entire length of both, had and has no need of the improvement as a means of access. As the value of the plaintiff's land depends wholly upon its own direct means of access thereto, it owes none of its value to the road for the improvement of which it has been assessed, and has received therefrom, no particular or special benefit, to any extent whatsoever, within the meaning of such, as under Section 1 of the Fourteenth Amendment to the Constitution of the United States, local assessments may be levied; between which and common or general benefits, there is a wide distinction, the same for the assessment of special benefits as for damages. The assessment of plaintiff's lands, in any sum whatsoever, and the justification thereof under said section 1214, results in the deprivation of the plaintiff of his property without due process of law, within the meaning of the terms of said Constitutional provision.

Mortimer Matthews, Plaintiff, in His Own Person

[fol. 9] [File endorsement omitted]

IN COURT OF APPEALS

[Title omitted]

WRIT OF ERROR—Filed Jan. 24, 1924

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio:

Because in the record and proceedings, as also in the rendition of the Judgment, of a plea which is in the said Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, before you or some of you, being the highest Court of law or Equity of said state in which decision could be had in the said suit between Mortimer Matthews and Louis J. Huwe, as Treasurer of Hamilton County, Ohio, wherein was drawn in question the validity of a statute of said state on the ground of its being repugnant to the provisions of the Constitution of The United States and the Amendments thereto and said decision was in favor of such, its validity, a manifest error hath happened, to the great damage of said Mortimer Matthews as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in their behalf, [fol. 10] do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington on the 23rd day of Feb., 1924, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of The United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of The United States should be done.

Witness the Honorable Wm. Howard Taft, Chief Justice of the Supreme Court of the United States, the 24th day of January, in the year of our Lord 1924.

B. E. Dilley, Clerk of the United States District Court in the Southern District of Ohio, Western Division, by Harry F. Rabe, Deputy. (Seal of the United States District Court, Southern District of Ohio.)

Allowed by Wade Cushing, Presiding Judge of the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio.

[fol. 11] CITATION—In usual form, showing service on Chas. J. Bell et al.; filed Jan. 28, 1924; omitted in printing

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[fols. 12-20] [File endorsement omitted]

IN COURT OF APPEALS

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed Jan. 28, 1924

Cincinnati, Ohio, January 28th, 1924.

The undersigned Counsel for the respective parties in this cause hereby stipulate that the Clerk of the Court, shall make a transcript of, shall certify and transmit the entire Record in this cause, together with all pleadings and papers filed in this Court, except such as were filed prior to the amended and supplemental petition, and except the testimony of the following witnesses contained in the Bill of Exceptions, to-wit: the cross-examination of J. A. Stewart, the testimony of H. D. Hooge, the cross-examination of Marianna Matthews, the testimony of H. Earl Johnston, and the testimony of W. E. Maddux, and except Plaintiff's Exhibit 7, and all that part of Plaintiff's Exhibit 11 beginning "Commissioners' Letter File," on page 200 to the end of said Exhibit 11, page 210 of the printed record in the Supreme Court of Ohio.

Mortimer Matthews, Plaintiff. Chas J. Bell, Pros. Atty. Hamilton County, Ohio, Chester J. Durr, Asst. Pros. Atty. Hamilton County, Ohio, Attorneys for Defendant.

[fol. 21] IN COURT OF APPEALS

[Title omitted]

DOCKET AND JOURNAL ENTRIES

June 18, 1923.—Certified copy from Supreme Court filed.

June 21 (Jan. Term).—Minute 174, Certified copy of entry of Supreme Court granting motion for stay of execution.

Upon motion of plaintiff in error herein it is ordered that execution of the judgment of the Court of Appeals of Hamilton County, Ohio, in cause No. 2010 on the docket of said court, wherein Mortimer Matthews is plaintiff, and Louis J. Huwe, as Treasurer of Hamilton County, Ohio, is defendant, and the collection of the assessments therein litigated, be stayed, until the final hearing of the case in this Court upon the plaintiff in error, Mortimer Matthews, giving bond to the defendant in error, said bond to be executed, on the part of the plaintiff in error with sufficient surety

in the sum of $200.00 to the satisfaction and approval of the Clerk of Courts of Hamilton County, Ohio, conditioned that plaintiff in error will prosecute his petition in error to effect, and will abide and perform the judgment of this Court and pay all damages, penalties and costs that may be awarded against him in this case.

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the records of said Court, to-wit: from Journal No. 29, Page —.

In witness whereof, I have hereunto subscribed my name and [fol. 22] affixed the seal of said Supreme Court this 19th day of June, A. D. 1923.

Seba H. Miller, Clerk, by L. J. Corcoran, Deputy. (Seal.)

1923, Dec. 27 (Nov. Term).—Minute 52 Certified copy from Supreme Court dismissing petition in error at the costs of plaintiff in error.

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Hamilton County, and it appearing to the Court that this cause was filed as of right and that the record presents no debatable constitutional question, it is ordered that the petition in error be, and the same hereby is dismissed.

It is further ordered that defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—.

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the records of said Court, to-wit: from Journal 29 page 587.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 11th day of December, A. D. 1923.

Seba H. Miller, Clerk, by L. J. Corcoran, Deputy. (Seal.)

1924, Jan. 24.—Petition for writ of errors from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio.

Jan. 24.—Assignment of errors on writ of error from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, filed.

Jan. 24.—Writ of error from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, filed.

[fol. 23] Jan. 24 (Jan. Term).—Minute 27, Entry allowing writ of error.

The above entitled cause coming on to be heard upon the petition of the Plaintiff therein for a writ of error from the Supreme Court of the United States to the Court of Appeals of the First Judicial District of the State of Ohio, Hamilton County, Ohio, and upon the examination of said petition and the record in said case, and desiring to give the petitioner an opportunity to present to the

Supreme Court of the United States the questions presented by the record in said case.

It is ordered that a Writ of Error be and the same is hereby allowed to this Court from the Supreme Court of The United States and that the bond presented by said petitioner be and the same is hereby approved.

Wade Cushing, Presiding Judge.

Cincinnati, Ohio, January 24th, 1924.

1924, Jan. 25.—Bond 111 in General Bond Book 12 in $200.00 given.

Jan. 25.—Two copies of Writ of Error filed.

Jan. 28.—Citation filed.

Jan. 28.—Stipulation as to Transcript of record filed.

Feb. 7 (Jan. Term).—Minute 37, Entry substituting Ferd J. Bader, Treasurer.

Now comes the plaintiff in this cause and suggests to the Court that after judgment in this cause in this Court, the term of office of the said Louis J. Huewe, as Treasurer of Hamilton County, Ohio, defendant expired, and his successor, Ferdinand Bader, having been elected, was qualified and inducted into office as Treasurer of Hamilton County, Ohio.

Now, therefore, in consideration of the premises and with the consent of Counsel of Record for both parties hereto, the Court directs and orders that said Ferdinand Bader, as such Treasurer, be substituted as defendant for said Louis J. Huwe, as Treasurer and that the said Judgment stand as against the said Ferdinand Bader, as [fol. 24] Treasurer, as aforesaid, and be in all respects as against him as such Treasurer; and be enforced against said Ferdinand Bader, as Treasurer, as aforesaid, in accordance with the statutes in such case made and provided.

Mortimer Matthews, Attorney for Plaintiff.

We consent for Ferdinand Bader, as Treasurer of Hamilton County, Ohio.

Chas. S. Bell, Chester S. Durr, Attorneys for Defendant.

[fol. 25] Bond on Writ of Error for $200—Approved and filed Jan. 25, 1924; omitted in printing

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[fol. 26] In Court of Appeals

Certificate of Lodgment

I, George W. Tibbles, Clerk of said Court, do hereby certify that there was lodged with me as said Clerk on January 25, 1924, in the case of Mortimer Matthews, plaintiff, against Louis J. Huwe, as Treasurer of Hamilton County, Ohio, defendant—

(1) The original bond a copy of which is herein set forth.

(2) Two copies of the Writ of Error as herein set forth, one for the defendant, and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court in Cincinnati, Hamilton County, Ohio, this fourteenth day of February, A. D., 1924.

Geo. W. Tibbles, Clerk of the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, by Albert Swing, Deputy Clerk. (Seal of the Court of Appeals, First Appellate District of Ohio.)

[fol. 27] IN COURT OF APPEALS

[Title omitted]

CLERK'S CERTIFICATE

I, George W. Tibbles, Clerk of the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, do, hereby certify that the foregoing petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Writ of Error, Citation to Defendant and His Entry of Appearance, and Stipulation as to Transcript of Record are the original papers filed in this Court in the above entitled cause; that the copy of the bond hereto attached is a true copy of the bond filed in said cause; that the (printed) copy of the record attached hereto beginning at the middle of page five thereof is a true copy of the printed record filed in said cause, (the parts erased therefrom on pages 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 178, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, and 210 being so erased in accordance with the stipulation as to tran- [fols. 28-32] script of record); that plaintiff's Exhibits 1, 9, and 10 attached are true copies of said Exhibits as attached to the Bill of Exceptions in this cause, that the transcript of Docket and Journal Entries as contained in said printed record and that the foregoing additional transcript of Docket and Journal Entries attached are truly taken and correctly copied from the records of this Court; and that the opinion attached hereto was rendered by the Court in said cause.

In witness whereof I have hereunto subscribed my name and affixed the seal of said Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, this 14th day of February, A. D., 1924.

Geo. W. Tibbles, Clerk of the Court of Appeals of the First Judicial District of Ohio, Hamilton County, Ohio, by Albert Swing, Deputy. (Seal of the Court of Appeals, First Appellate District of Ohio.)

Clerk's fee for add. transcript in Court of Appeals, $1.75; paid by Mortimer Matthews.

[fol. 33] COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO

MORTIMER MATTHEWS, Plaintiff,

vs.

LOUIS J. HUWE, Treasurer, etc., Defendant.

TRANSCRIPT AND ORIGINAL PAPERS ON APPEAL—Filed April 5, 1922

[fol. 34] IN COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

MINUTE ENTRIES

Petition filed January 17, 1921. Action for injunction and other relief.

1921, Jan. 17th (Jan. Term).—Minute 3039. Temporary restraining order allowed. Bond, $200.00. Let temporary restraining order issue as prayed for. Bond in the sum of two hundred dollars ($200.00) to the satisfaction of the clerk.

Jan. 17th.—Bond, 184 in Bond Book 22, in $200.00 given (see safe).

Jan. 17th.—Summons issued. Indorsed: Injunction allowed. Bond $200.00 given. Fred E. Wesselman, clerk, by Albert Swing, deputy.

Jan. 17th.—Motion for temporary restraining order filed.

Jan. 24th.—Summons returned indorsed: Received. Ferd Bader, Sheriff Hamilton County, Ohio. Jan. 17th, 3.42 p. m., 1921.

Cincinnati, January 18, 1921.

Served the within named defendant, Louis J. Huwe, as Treasurer of Hamilton County, Ohio, by delivering to him personally a true copy of this writ with all the indorsements thereon.

Ferd Bader. Sheriff Hamilton County, Ohio, by Ray D. Podesta, Deputy.

Sheriff fees, 91 cents.

[fol. 35] Jan. 28th.—Demurrer of defendant filed.

Feb. 7th.—Motion to withdraw demurrer filed.

Feb. 7th (Jan. Term).—Minute 3136. Entry granting leave to withdraw demurrer and granting defendant additional time in which to plead.

This cause now coming on for hearing on the motion of Louis H. Capelle, Prosecuting Attorney of Hamilton County, acting by and for the defendant herein, the court on consideration thereof grants the right to withdraw the demurrer heretofore filed herein

and grants said defendant the right to answer herein on or before the 26th day of February, 1921.

1921, Mar. 5th (Jan. Term).—Minute 3233. Leave given defendant to file motion for an extension of time in which to answer.

Mar. 5th.—Motion filed.

Mar. 5th (Jan. Term).—Minute 3233. Entry granting an extension of time in which to answer.

This cause coming on for hearing on the motion of Louis H. Capelle, Prosecuting Attorney of Hamilton County, Ohio, acting by and for the defendant herein, the court on consideration thereof grants an extension of time in which to answer until the 29th day of March, 1921.

Mar. 7th.—Answer of defendant filed.

1922, Jan. 5th (Jan. Term).—Minute 3007. Leave given to file amended and supplemental petition.

Jan. 5th.—Amended and supplemental petition filed.

[fol. 36] Jan. 5th. (Jan. Term).—Minute 3007. Entry granting leave to file amended and supplemental petition.

On application of plaintiff leave is given to file his amended and supplemental petition and the same is filed accordingly.

Jan. 5th (Jan. Term).—Minute 3007. Temporary restraining order allowed. Bond $500.00.

Let temporary restraining order issue as prayed for. Bond in the sum of five hundred dollars to the satisfaction of the clerk.

Jan. 5th.—Bond 276 in Bond Book 22, in $500.00 for injunction given (see safe).

Jan. 5th.—Summons issued to January 16, 1922. Indorsed: Injunction allowed. Bond in $500.00 given. George W. Tibbles, clerk, by Albert Swing, deputy.

Jan. 7th.—Answer to amended petition filed.

Jan. 16th.—Summons returned indorsed: Received. Ferd Bader, Sheriff, Hamilton County, Ohio. Jan. 5th, 3:56 p. m., 1922.

Cincinnati, Jan. 6, 1922.

Served the within named defendant, Louis J. Huwe, as Treasurer of Hamilton County, Ohio, by delivering to him personally, a true copy of this writ with all the indorsements thereon.

Ferd Bader, Sheriff, Hamilton County, Ohio, by John Krieg, Deputy.

Sheriff fees, 91 cents.

[fol. 37] 1922, Feb. 20th (Jan. Term).—Minute 1406. Application for an official stenographer filed and allowed.

Mortimer Matthews, attorney for plaintiff and C. S. Durr, Assistant Prosecutor, attorney for defendant, request the services of an official stenographer to make a full report of the testimony and proceedings in this case.

(Signed) C. S. Durr, for Defendant. Mortimer Matthews, for Plaintiffs.

The above request for an official stenographer is granted and John C. Kiehborth is appointed to make a full report of the testimony and proceedings.

Feb. 20th (Jan. Term).—Minute 1408. Entry ordering the official stenographer to transcribe testimony.

For good cause shown the court of its own motion orders John C. Kiehborth, official stenographer, to make a transcript of the testimony in this case and the costs to be paid by warrant on the county treasurer and taxed and collected as other costs in this case and certificate for $30.24 issued for same.

Mar. 31st (Jan. Term).—Minute 1587. Entry dissolving temporary injunction at the costs of plaintiff. Plaintiff gives notice of appeal. Appeal bond, $200.00.

This cause coming on to be heard this day on the pleadings, the evidence and arguments of counsel, and the court being fully ad-
[fol. 38] vised finds for the defendant.

Wherefore it is ordered, adjudged and decreed that the temporary restraining order heretofore issued be dissolved, the prayer for an injunction be refused, the action dismissed, and the defendant recover from the plaintiff his costs herein expended.

The plaintiff having given notice of his intention to appeal the court fixes the appeal bond in the sum of $200.00.

1922, Apr. 3d.—Bond, 7 in Bond Book 25, in $200.00 for appeal given (see safe).

Clerk's certificate to foregoing paper omitted in printing.

[fol. 39] IN COMMON PLEAS COURT

AMENDED AND SUPPLEMENTAL PETITION—Filed January 5, 1922

The plaintiff, Mortimer Matthews, says that he is, and has been, for many years, a citizen and resident of Hamilton County, in the State of Ohio, and that Louis J. Huwe, as Treasurer of Hamilton County, in the State of Ohio, defendant herein, was elected, and is now qualified and acting as such, and that the tax duplicate for the year 1921 is now in his hands as treasurer as aforesaid for the collection of taxes and assessments thereupon entered.

Plaintiff is, and was at all times mentioned in this petition, the owner in fee simple of certain tracts of land in Sycamore Township in Hamilton County, in the State of Ohio, and entered upon said duplicate as follows:

(1) A tract of land containing ten (10) acres — southwest quarter of Section 35, Township 4, Range 1. Said tract is thus entered upon said duplicate in plaintiff's name at a total value of eleven hundred ($1,100.00) dollars; and one-half (½) of the taxes assessed and levied thereon on said duplicate for the year nineteen hundred and

twenty-one, payable January 15, 1922, is $6.57 of which, however, the defendant will not accept payment unless plaintiff, also, pays three certain instalments of an assessment on part thereof, for the improvement of Section X, of the Glendale and Milford Road, being Intercounty Highway, No. 46, Section X, in the sum of $2.40 each, which, also, appear upon said duplicate as payable at the same time. [fol. 40] A part of said land, to-wit, five and ninety-six hundredths (5.96) acres thereof, is claimed by the County Commissioners of Hamilton County, Ohio, to lie within a half mile of said Section X, by direct line, but do not abut upon the same, and is the part, on which said assessment is levied. None of said land, however, lies within a half mile of said Section X by the nearest connecting public roads.

(2) A tract of land containing forty (40) acres in the southwest quarter of Section 35, Township 4, Range 1. Said tract is thus entered upon said duplicate in plaintiff's name at a total valuation of forty-four hundred ($4,400.00) dollars; and one-half (½) of the taxes assessed and levied thereon on said duplicate for the year nineteen hundred and twenty-one, payable January 15, 1922, is $26.27, of which, however, the defendant will not accept payment, unless plaintiff also pays three certain instalments of an assessment on part thereof for the same improvement as last above described, in the sum of $3.70 each, which, also, appear against the same on said duplicate as payable at the same time. A part of said forty (40) acres, to-wit, nine and seventy-six hundredths (9.76) thereof, is claimed by the County Commissioners of Hamilton County, Ohio, to lie within a half mile of said improvement, by direct line, but does not abut upon the same, and is the part, on which said assessment is levied. None of said tract, however, lies within a half mile of said Section X, by the nearest connecting public roads.

[fol. 41] (3) A tract of land containing eighty-seven and fifty-one hundredths (87.59) acres in the north one-half (½) of Section 35, Township 4, Range 1. Said tract is thus entered upon said duplicate in plaintiff's name, at a total value for said land, and the buildings and improvements thereon, of twenty thousand and forty ($20,040) dollars; and one-half (½) of the taxes assessed and levied thereon, on said duplicate, for the year nineteen hundred and twenty, payable January 15, 1922, is $119.64, of which, however, the defendant will not accept payment, unless plaintiff, also, pays three certain instalments of an assessment on part, thereof, for the same improvement, as aforesaid, in the sum of $24.21 each, which, also, appear upon said duplicate against the same as payable at the same time. A part of said land, to-wit, forty-four and seven hundredths (44.07) acres thereof, is claimed by the County Commissioners of Hamilton County, Ohio, to lie within a half mile of said improvement, by direct line, but does not abut upon the same, and is the part, on which said assessment is levied. None of said tract, however, lies within a half mile of said Section X by the nearest connecting public roads.

(4) A tract of land containing fifty-nine and seventy-eight hundredths (59.78) acres in the south one-half (½) of Section 35,

Township 4, Range 1. Said tract is thus entered upon said duplicate in plaintiff's name, at a total valuation for said land, and the buildings and improvements thereon, of six thousand eight hundred and thirty ($6,830) dollars, and one-half (½) of the taxes assessed [fol. 42] and levied thereon, on said duplicate for the year nineteen hundred and twenty-one, payable January 15, 1922, is $40.77, of which, however, the defendant will not accept payment, unless plaintiff, also, pays three certain instalments of an assessment thereon, for the same improvement as aforesaid, in the sum of $24.29 each, which, also, appear upon said duplicate against the same as payable at the same time. Said tract lies within half a mile of said improvement, by direct line, but does not abut upon the same; and said assessment is levied upon the whole tract, none of which, however, lies within a half mile of said Section X, by the nearest connecting public roads.

(5) The plaintiff is, also, assessed upon an additional forty-five hundredths (.45) of an acre claimed to be a part of said forty (40) acre tract above described. Two instalments of an assessment for the same, due, and payable on January 20, 1921, and June 20, 1921, are one and eighty-one hundredths ($1.81) dollars each. Said assessment, if properly entered, is for the same improvement, and the land upon which it is made, is claimed by the County Commissioners of Hamilton County, Ohio, to lie by direct line within half a mile of, but does not abut upon the same. Said assessment, however, is an error, and is not upon a portion of said forty (40) acre tract; but is a duplication of a part of the assessment made upon said forty-four and seven hundredths (44.07) acres above described, and is included in the same. None of said tract, lies within a half mile of said Section X, by the nearest connecting public roads.

[fol. 43] The County Commissioners of Hamilton County, Ohio, on April 13, 1920, adopted resolutions to the effect that the public interest demanded the improvement under the provisions of Sections 1178 to 1231-11, inclusive, of the General Code of Ohio of that part of Intercounty Highway No. 46, situated in the County of Hamilton, and described as beginning at the Carthage-Hamilton Road, Intercounty Highway No. 43, thence along the line of the Glendale-Milford Road, Intercounty Highway No. 46, to the Miami River, in Springfield, Sycamore and Symmes townships, in all, a distance of nine and one-tenth miles; and that they did thereby make application to the State Highway Commissioner for aid by the State of Ohio for said improvement and did thereby agree to pay one-half the preliminary expenses thereof, and immediately transmitted the same to the said Highway Commissioner, who on or about April 16, 1920, approved said application exactly as requested. Said approval was received by said County Commissioners and was ordered filed by them April 30, 1920.

Said action by said County Commissioners was upon their own initiative and without a petition therefor of any of the owners of the lineal feet abutting on said Intercounty Highway No. 46, including Section X thereof. The said application was for state aid in the

improvement, as distinguished from the construction, of said Intercounty Highway No. 46, which had, including said Section X, been already constructed, and was for all of the same that is situated in [fol. 44] Hamilton County, nine and one-tenth miles in length, as distinguished from any fractional part, or section thereof, such as Section X, only two and fifty-seven hundredths miles in length, as described in the subsequent proceedings, all of which expressly concern said Section X only, and its improvement as distinguished from its construction. Said County Commissioners did not adopt any resolution that the public interest demanded the improvement of said Section X only.

On May 11, 1920, said County Commissioners adopted resolutions, reciting said initial resolutions, application, agreement and approval, as hereinbefore alleged, and declaring it necessary to improve that part only of the Glendale-Milford Road, also known as Intercounty Highway No. 46, beginning at the point where Intercounty Highway No. 46 intersects Intercounty Highway No. 43, thence east along the route of Intercounty Highway No. 46 to the point where Intercounty Highway No. 46 intersects Intercounty Highway No. 19, being all in Springfield and Sycamore townships, Hamilton County, Ohio, and comprising a distance of only two and fifty-seven hundredths miles, designated and thereafter to be known as Section X of the Glendale-Milford Road, or Intercounty Highway No. 46.

Said resolutions further provided, that the County of Hamilton pay all the expenses and costs of the improvement over and above the amount contributed by the state, and over and above the amount to be raised by assessments to be levied on all property lying within one-half mile on both sides of the proposed improvement in accordance [fol. 45] to the benefits thereto, being that part of the entire cost of the improvement represented by ten per cent (10%) of the most expensive type of improvement contemplated in the plans, profits, specifications, and estimates, excepting therefrom the cost of bridges and culverts.

Said plans, profiles, specifications and estimates, included a change in a part of the line of said proposed improvement of said Section X from that followed by the existing highway, and thereby needlessly increased the total cost of the same about fifteen thousand dollars. By making such change it was not possible to eliminate dangerous curves, sharp angles or steep grades; nor was such change planned and specified with any such purpose in view. In adopting said most expensive type of improvement and in specifying said unnecessary change, said County Commissioners exceeded their jurisdiction, if any; and the same was an abuse of discretion.

Said resolutions of May 11, 1920, also, waived contribution from Springfield and Sycamore townships, in which said Section X is situated, of their share of the cost of improving said section, only, of said road, but did not add the same nor any part thereof, nor any of the county's share of said cost and expense to the amount to be assessed upon property owners, and provided that ten per cent only, and no more, of said total cost and expense, excepting therefrom the cost of bridges and culverts, should be assessed against the real estate

within one-half (½) mile of both sides of said section of said Inter-
[fol. 46] county Highway, whereas, under the law applicable thereto, the same could not be assessed, if at all, except upon property abutting upon the improvement.

Said resolutions, also, instead of providing that the assessment of said ten per cent only, of the total cost and expense of improving said section, excepting therefrom the cost of bridges and culverts, should be apportioned by the County Surveyor, upon his own judgment, according to the benefits accruing to the land located within one-half (½) mile, as aforesaid, actually and expressly directed the arbitrary division of the same into three (3) equal parts, one of which parts, or three and one-third per cent of the total cost of said improvement, should be assessed against the property abutting upon said Section X in proportion to the number of front feet contained in each part, parcel, tract, and lot, abutting upon said Section X; and that the second part thereof, or three and one-third per cent of the total cost of said improvement, should be assessed against all the property within one-half (½) mile of both sides of said Section X, in the proportion to the acreage or area thereof; and finally, that the remaining one-third (⅓) of the same, or three and one-third per cent of the total cost of said improvement should be assessed against all of the property within one-half (½) mile of both sides of said Section X in proportion to the tax valuation of each part, parcel, tract, and lot involved, as the same appears on the tax duplicate of said county.

On the same day, May 11, 1920, said County Commissioners, by [fol. 47] unanimous vote, adopted resolutions purporting to notify said property owners, in manner and form more fully hereinafter described, and providing for the publication of said resolutions, and for the presentation and hearing of claims for compensation.

Thereafter, on May 28, 1920, said County Commissioners, by unanimous vote, adopted resolutions determining to proceed with the improvement, of said section only of said Intercounty Highway. Said resolutions, instead of requiring the County Surveyor of Hamilton County, Ohio, to make a tentative apportionment of the amount to be paid by the owners of abutting property only; and instead of directing him to make the same, upon his own independent judgment, according to the benefits accruing to the land to be assessed, expressly directed him to make, by actual view, an estimated assessment upon the lands within one-half (½) mile, as aforesaid, in accordance with the arbitrary resolution theretofore unanimously dopted by the Board of County Commissioners, to-wit, the resolutions of May 11, 1920, as above described.

Thereafter, on June 22, 1920, said County Commissioners, by Unanimous vote, adopted a resolution, reciting that the County Surveyor had filed an estimated assessment against the property lying within one-half (½) mile of either side of said Section X only, and had proportioned the total amount to be raised by assessing said property in accordance with the arbitrary plan theretofore adopted by said Board of County Commissioners. Said resolution thereupon proceeded to assess ten (10) per centum only and no more, of the [fol. 48] entire cost and expense of said improvement, being the

sum of $15,607.15, against the so-called "abutting property owners" lying within one-half (½) mile of both sides of said Section X of said Intercounty Highway, according to the arbitrary plan previously adopted on May 11, 1920, as above described.

Said assessment was not apportioned according to the benefits accruing to the land so located. The use of the word, "abutting" in said resolution was a misrepresentation of fact, and an attempt at an evasion of the law.

Said resolution of June 22, 1920, also provided for the advertisement of said assessment, without describing the lands lying within one-half (½) mile on both sides of said Intercounty Highway, Section X except as such, and without naming the several owners thereof, to many of whom, including the plaintiff, the name, number and section of said Intercounty Highway, having been but recently given, were unknown. The publication of said resolution was made accordingly, and was evasive of the law and altogether inadequate for the due notification of said property owners, including the plaintiff. The aforesaid resolution of May 11, 1920, purporting to notify property owners, and the publication thereof, were defective, evasive and inadequate in the same manner for the same reasons, and to the same extent. The plaintiff had no actual knowledge or notice of any of the proceedings alleged in this petition, or of said assessment, until after the first day of December, 1920.

Thereafter, on July 9, 1920, said Board of County Commissioners, [fol. 49] by unanimous vote, adopted a resolution confirming said assessments, and certifying the same to the Auditor of Hamilton County, Ohio, and providing that all unpaid assessments should be placed on a special duplicate, with interest added thereto, to be paid in twenty (20) equal instalments, one every six (6) months, beginning Dec. 20, 1920, during ten (10) years. Said resolution contained a recital that such apportionment was according to the benefits which will result in said real estate; but said recital was evasive of the law applicable thereto, and a misrepresentation of fact and of the mode and manner, in which said assessments had been levied, as hereinbefore described, and as appears upon the face of the proceedings.

Said resolution of July 9, 1920, made no provision for the payment of said assessments within a limited time without interest, at the option of the property owners; but ostensibly provided for said interest at the same rate, six (6) per cent, as that upon bonds to be issued and sold for the payment of the cost of said improvement, and that said assessments were for the payment of said bonds with interest. Said interest, nevertheless, as carried into said assessments and certified, is in fact, nearly twice as much as is necessary for such purpose and as is authorized by law and is usurious, and at the rate of ten and eight-tenths per cent.

Five and ninety-six hundredths (5.96) acres of plaintiff's ten (10) acre tract, first above described, have been assessed, as aforesaid, in the total sum of $47.89, of which $17.96 is interest, and of which the sum [fol. 50] of $2.40, is the first of twenty semi-annual payments entered by the Auditor of Hamilton County, Ohio, upon the special and

general duplicates as aforesaid. Since the filing of the original petition herein two further instalments have become due and are now payable unless enjoined.

Nine and seventy-six hundredths (9.76) acres of plaintiff's forty (40) acre tract, second above described, have been assessed, as aforesaid in the total sum of $73.81, of which $27.68 is interest, and of which the sum of $3.70 is the first of twenty semi-annual payments similarly entered, as above described. Since the filing of the original petition herein two further instalments have become due and are now payable unless enjoined.

Forty-four and seven hundredths (44.7) acres of plaintiff's eighty-seven and fifty-nine hundredths (87.59) acre tract, third above described, have been assessed as aforesaid in the total sum of $484.10 of which $181.54 is interest and of which the sum of $24.21 is the first of twenty (20) semi-annual payments similarly entered, as above described. Since the filing of the original petition herein two further instalments have become due and are now payable unless enjoined.

The whole of plaintiff's fifty-nine and seventy-eight hundredths (59.78) acre tract, fourth above described, has been assessed, as aforesaid, in the total sum of $485.73, of which the sum of $182.15 is interest, and of which the sum of $24.29 is the first of twenty (20) semi-annual payments, similarly entered, as above described. Since [fol. 51] the filing of the original petition herein two further instalments have become due and are now payable unless enjoined.

The whole of said forty-five hundredths (.45) of an acre, fifth above described, appears on said tax duplicate as a part of plaintiff's forty-four and seven hundredths, third above described. It has, however, been assessed in the total sum of $3.62, of which $1.36 is interest, and of which the sum of $1.81 is the first of two semi-annual payments otherwise similarly entered, as above described. Since the filing of the original petition herein the said second instalment has become due and is now payable unless enjoined.

Plaintiff has not paid any of said assessments or any instalments thereof. The work upon said improvement was not begun until long after the commencement of this suit, and the obtaining of a preliminary restraining order.

So much of plaintiff's said lands, first, second, third and fifth described, as are assessed as aforesaid, lie and abut upon the north side of a county road situated in a direct line less than one-half (½) mile north of said Intercounty Road No. 46, Section X; and plaintiff's land, fourth above described, on the south side of said county road. None of said lands can use said Section X except by first traversing from more than half a mile to a mile or more of connecting roads. Said county road approximately parallels said Intercounty Road No. 46, Section X, throughout its entire length, with the exception of converging in a southerly direction toward the [fol. 52] same near its eastern terminus in Intercounty Road No. 19, and with the further exception of about a quarter of a mile in its western half, during which it converges in a northerly direction, toward the village of Glendale. The result is that said parallel county road

is shorter by half a mile between Glendale and said Intercounty Road No. 19, at its intersection with said Section X, than is the route between said points over said Intercounty Road No. 46, Section X. Plaintiff's said lands are nearer Intercounty Highway No. 43 at the village of Glendale by the parallel county road, on which they abut than they are by the use of said Intercounty Road No. 46, Section X, by fully a mile; and nearer Intercounty Highway No. 19, at its intersection with said Section X, by half a mile. No special benefits whatsoever will accrue to plaintiff's said lands from the improvement of Intercounty Road No. 46, Section X, but on the contrary, the same is, and will be a detriment to said lands and to plaintiff, for the reason that said parallel county road, upon which his lands abut, also, needs improvement, and a large part of the land, upon which the cost and expenses thereof can be assessed, is already assessed for the improvement of Intercounty Road No. 46, Section X, which fact the County Surveyor, in making any future estimated assessment for the improvement of said parallel county road, may take into consideration, in apportioning such an assessment. Any future assessment, therefore, for the improvement of said parallel county road would have to fall to a greater extent than otherwise, upon plaintiff's abutting tracts and lands. Further- [fol. 53] more, any assessment therefor, under the law applicable thereto, would have to be without state aid, and in a much larger proportion of the total cost of the improvement, than in the case of said Intercounty Road No. 46, Section X. The improvement of said parallel county road will therefore be very much delayed, if not entirely prevented.

Said detriment falls with peculiar force on plaintiff and upon his said lands, because the same extend along said parallel county road on both sides thereof, for nearly a mile, and are, and can not but be, operated together as one farm, between the different parts of which there is, and must be, constant inter-communication, and yet plaintiff is not able to make full use of said parallel county road on account of a steep grade thereon, extending several hundred feet, about in the center of said farm. Plaintiff, accordingly, has been and is obliged to build, and maintain, at great expense, a private road of easier grade, in his own lands, to the north of said county road, so as to be able to haul normal loads to and from the different parts of his said farm.

Said detriment very much outweighs any special benefit that might be imagined for the lands abutting on said parallel county road, including especially, those of the plaintiff.

Said Board of County Commissioners, in planning, directing, confirming, and assessing one-third (1/3) of said amount to be assessed according to value, as above described, included therein, not only the value of the land itself as valued for taxation, but, also, that of [fol. 54] the buildings and improvements thereon, as separately appraised and separately carried out, upon the tax duplicate. In so doing, it so clearly failed to assess according to benefits, some of the land which does not abut upon said Intercounty Road No. 46, Section X, but does abut upon said parallel county road including the

third described 44.07 acres and the fourth described 59.78 acres of the plaintiff, that the aggregate assessment upon one of the latter is actually greater than that upon equal areas of some of the lands abutting upon said Intercounty Road, Section X. Furthermore, to direct the inclusion of the value of buildings and improvements as a necessary part of an assessment according to benefits was wholly unauthorized by law.

Upon said 87.59 acre tract, of which said 44.07 acres assessed, is a part, plaintiff is taxed upon said duplicate on valuations for the land alone of $10,790.00, and for the buildings and improvements thereon of $9,250.00, making a total of $20,040.00 Said 44.07 acres are a little more than half of said 87.59 acres. Said assessment according to value thereon, was based upon the same ratio, a little more than half of said total valuation for land and buildings, that is, on $10,080.00. This was done upon the assumption, that plaintiff's buildings and improvements are equally distributed between said 44.07 acres assessed and the remainder of the tract, which is not the case. Considerably more than one-half thereof, and more than three-fourths even, in value, are situated on the said remainder of said tract, and more than half a mile in a direct line from said Sec-
[fol. 55] tion X, but are included, nevertheless, in said assessment, and totally without authority of law.

Said Board of County Commissioners, in initiating and continuing said proceedings, without a petition; in adopting a resolution that the public interest demanded the improvement of the whole of Intercounty Highway No. 46, and proceedings thereupon to improve Section X only thereof; in the abuse of discretion, above described; in assessing plaintiff's land not abutting upon the improvement, but upon a parallel county road, and not lying within a half mile thereof by the nearest connecting public roads; and not benefited thereby; and upon an arbitrary plan which was not according to benefits accruing to the same; and in instructing the County Surveyor, as it did, instead of merely causing him to make a tentative apportionment according to benefits; and without adequate notice to, or actual knowledge of plaintiff; and in including the value of buildings and improvements in its assessment; and in including therein the values of some of the same not situated in a direct line within half a mile of said improvement; and in the deprivation of said option; and in said usurious overcharge of interest; all as above described; and in assessing any part at all of the cost of an improvement of an Intercounty Highway upon lands supposed to be specially benefited thereby; acted in each and every one of said specifications without jurisdiction or authority, and all of said assessments on plaintiff's said property are illegal and void.

[fol. 56] If said assessments are enforced, plaintiff will be deprived of his property for public use, without compensation and so far as abutting property owners may have been relieved from assessment, for private use, and without due process of law, in violation of his rights as the owner thereof, and in violation of Article 1, Section 19, of the constitution of the State of Ohio and of the fourteenth amendment to the constitution of the United States

of America. If such inadequate notice and publication as was made and is alleged, and if such deprivation of said option and such overcharge of interest, as is alleged, are justified by the meaning of the sections of the General Code, applicable thereto, said sections are also in violation of the same constitutional provisions, including also that which secures to him the equal protection of the laws. And finally the provisions of the General Code requiring at all events the assessment upon property owners of ten per cent. of the cost of the improvement of Intercounty Highways are in violation of Article 1, Section 19 of the constitution of the State of Ohio.

Said assessments, as they appear upon the special duplicate in the office of the Auditor of Hamilton County Ohio, and the first four instalments thereof, as they appear upon the general duplicate of said county, now in the hands of the defendant for collection, are a charge and lien upon plaintiff's said real estate, with all the powers given defendant by law for distraint and sale in the case of delinquent taxes, and with all the penalties thereunto attached. Unless [fol. 57] defendant is enjoined by this court from the collection of the same, plaintiff, to avoid said penalties and to avoid becoming delinquent for her general taxes, will be obliged to pay each one of said instalments as it comes due, under protest, and to sue for its recovery. This will cause a multiplicity of suits and a cloud will be placed upon his title and he will suffer great and irreparable loss and injury for which she has no adequate remedy at law.

Wherefore plaintiff prays that the defendant, Louis J. Huwe, as treasurer of Hamilton County, Ohio, be temporarily restrained from collecting any and all of the instalments of each and every one of said assessments, and that, upon final hearing hereof, he and his successors, be perpetually enjoined from collecting or enforcing the same, and the whole of each and every one of said assessments, and for all other relief necessary and proper in the premises.

Mortimer Matthews, Attorney for Plaintiff.

Jurat showing the foregoing was duly sworn to by Mortimer Matthews omitted in printing.

[fol. 58] IN COMMON PLEAS COURT

ORDER FOR TEMPORARY RESTRAINING ORDER

Forty cents due notary.

Let temporary restraining order issue as prayed for. Bond in the sum of five hundred dollars to the satisfaction of the clerk.

Roettinger, J.

IN COMMON PLEAS COURT

PRÆCIPE FOR SUMMONS

Please issue summons against the defendant, indorse action for equitable relief.

Mortimer Matthews, Attorney for Plaintiff.

IN COMMON PLEAS COURT

SUMMONS & SHERIFF'S RETURN

THE STATE OF OHIO,
Hamilton County, ss:

To the sheriff of the county of Hamilton:

You are commanded to notify Louis J. Huwe, as Treasurer of Hamilton County, Ohio (amended and supplemental petition), defendant, that he has been sued by Mortimer Matthews (amended and supplemental petition), plaintiff, in the Court of Common Pleas of Hamilton County, and that unless he answer by the fourth day of February A. D., 1922, the amended and supplemental petition of the said (amended and supplemental petition), plaintiff against him filed in the clerk's office of said court, such amended and supplemental petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 16th day of January A. D., 1922.

[fol. 59] Witness my hand and the seal of the said court at Cincinnati, this 5th day of January A. D., 1922.

Geo. W. Tibbles, Clerk of the Court of Common Pleas of Hamilton County, Ohio, by Albert Swing, Deputy. (Seal.)

Cincinnati, Ohio, January 6, 1922.

Served the within named defendant, Louis J. Huwe as Treasurer of Hamilton County, Ohio, by delivering to him personally, a true copy of this writ with all the indorsements thereon.

Ferd Bader, Sheriff Hamilton County, Ohio, by John Krieg, Deputy.

Sheriff's fees, 91 cents.

IN COURT OF COMMON PLEAS

ANSWER TO AMENDED PETITION—Filed January 7, 1922

The defendant, Louis J. Huwe, admits that he is the duly elected, qualified and acting Treasurer of Hamilton County in the State of Ohio, and was such at all times mentioned in the petition. That the tax duplicate for the year 1921 is in his hands as treasurer for the collection of taxes and assessments thereupon entered.

[fol. 60] Further answering, the defendant herein denies each and every allegation in said petition contained not herein specifically admitted to be true.

Louis Capelle, Pros. Atty.; C. S. Durr, Asst. Pros. Atty., Attorneys for Defendant.

Jurat showing the foregoing was duly sworn to by Louis J. Huwe omitted in printing.

[fol. 61] IN COURT OF APPEALS

MINUTE ENTRY OF JUDGMENT

Transcript and original papers filed April 5, 1922, Common Pleas Court, No. 177016.

1923, Apr. 25th (Jan. Term).—Minute 113. Decree finding for defendant and enjoining defendant from collecting interest on deferred instalments of assessments in excess of six per cent, plaintiff to pay two-thirds and defendant one-third of the costs in the Court of Common Pleas and each party to pay one-half costs in Court of Appeals.

This cause coming on to be heard on appeal from a judgment of the Court of Common Pleas of Hamilton County, Ohio, the pleadings and the evidence and having been argued by counsel and being fully advised in the premises the court finds:

1. That the County Commissioners of Hamilton County, Ohio, were authorized to levy assessments on the property in question; that their proceedings were had in conformity to law and that the assessments are valid.

2. That said assessments covering a period of ten (10) years, except so much of the interest included therein as is in excess of the rate of six per cent (6%) per annum, are a lien on the Real Estate.

[fol. 62] 3. That so much of the interest charges on deferred instalments as is in excess of the rate of six (6%) per cent per annum, the same rate of interest borne by the bonds, issued in anticipation of the collection of such assessments, is illegal and should be enjoined.

4. The court further finds that as to all matters except the interest on deferred instalments of assessments in excess of six (6%) per cent on each instalment from the date of the bonds to the time of the payment of the deferred instalment, the plaintiff is not entitled to an injunction as prayed for.

Wherefore it is ordered, adjudged and decreed by the court that the defendant, Louis J. Huwe, Treasurer of Hamilton County, be, and he, hereby is forever enjoined from collecting any interest on deferred instalments of assessments against the Real Estate owned by the plaintiff within the assessment area of the Glendale and Milford Road, Section X, in excess of six per cent (6%) from the date of the bonds issued in anticipation of the collection of said assessments to the date of the payment of said deferred instalments of assessments.

Coming now to assess the costs of this action, the court being fully advised, does hereby, order, adjudge and decree that two-thirds of the costs of this action, as incurred in the Court of Common Pleas, shall be paid by the plaintiff herein, and one-third by the defendant, and that one-half of the costs of this action incurred in this court shall be [fols. 63-243] paid by the plaintiff herein, and one-half thereof by the defendant.

And to all of the foregoing findings and judgment except so much thereof as enjoins the collection of a part of the interest on deferred instalments of assessments the plaintiff accepts.

May 8th.—Bill of Exceptions filed.

May 8th.—Waiver of Notice and consent to immediate transmission of Bill of Exceptions filed.

May 8th.—Bill of Exceptions transmitted to Judges Cushing, Buchwalter and Hamilton.

May 8th.—Bill of Exceptions received from Judges Cushing, Buchwalter and Hamilton signed and allowed.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 244] IN THE SUPREME COURT OF THE UNITED STATES

No. 834, October Term, 1923

MARIANNA MATTHEWS, Plaintiff-in-Error,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio, Defendant-in-Error

No. 835, October Term, 1923

MORTIMER MATTHEWS, Plaintiff-in-Error,

vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio, Defendant-in-Error

STIPULATION OF COUNSEL TO CONSOLIDATE AND AS TO PRINTING—Filed March 3, 1924

Cincinnati, Ohio, February 28, 1924.

The undersigned counsel for the respective parties in these two causes hereby stipulate that the two causes shall be submitted upon the same arguments and printed Briefs; that in the printing of the record in the case wherein Mortimer Matthews is plaintiff, the opinion of the Court below and the Bill of Exceptions and Exhibits attached thereto, beginning at page 36 of the printed record attached to the record, shall be omitted; and that in printing the record in the case wherein Marianna Matthews is plaintiff, Exhibits 1; 9; and 10; shall be reproduced in a reduced from approximate in size to Exhibits 12; and 13, thereto attached.

Mortimer Matthews, Counsel for the Plaintiffs-in-Error.
Chas. S. Bell, Pros. Atty., and Chester S. Durr, Asst. Pros. Atty., Counsel for Defendant-in-Error.

Endorsed on cover: File No. 30,145. Ohio Court of Appeals, First Judicial District. Term No. 298. Mortimer Mattthews, plaintiff in error, vs. Louis J. Huwe, as treasurer of Hamilton County, Ohio. Filed February 23rd, 1924. File No. 30,145.

Office Supreme Court
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Supreme Court of the United States

No. [redacted]

OCTOBER TERM [redacted] 1925

MARIANNA MATTHEWS,

Plaintiff in Error,

(30144) vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

MORTIMER MATTHEWS,

Plaintiff in Error,

(30145) vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

In Error to the Court of Appeals for the First Judicial District of the State of Ohio.

BRIEF FOR THE PLAINTIFFS IN ERROR.

MORTIMER MATTHEWS,
Counsel for Marianna Matthews,
Plaintiff in Error,
and
Pro se.

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Supreme Court of the United States

Nos. 297 and 298.

OCTOBER TERM, 1924.

MARIANNA MATTHEWS,

Plaintiff in Error,

(30144) vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

MORTIMER MATTHEWS,

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(30145) vs.

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In Error to the Court of Appeals for the First Judicial District of the State of Ohio.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASES.

By stipulation of counsel, these two causes are submitted upon the same arguments and printed briefs. (Record 297, page 92; Record 298, page 24.)

The writs of error, in both, sued out on the same grounds, are for the review and modification of judgments of the Court of Appeals of Hamilton County, Ohio, in and for the First Judicial District of that state, favorable, so far as they went, to the plaintiffs in error. (Record 297, pages 1-4; Record 298, pages 1-4.) These judgments were entered on the twenty-fifth day of April, 1923. (Record 297, page 26; Record 298, page 23.) The plaintiffs excepted,

and brought as of right, proceedings in error thereto, upon the records herein, upon the same constitutional grounds, as herein alleged, and others, in the Supreme Court of Ohio, on May 24, 1923. These proceedings were dismissed by the latter court on the 4th day of December, 1923, on the sole ground that the records herein did not present any debatable constitutional question. (Record 297, page 12; Record 298, page 7; *Matthews* v. *Huwe*, 109 Oh. St. 628.)

The plaintiffs did not file motions in the Supreme Court of Ohio for certification of the record on the ground that the cases involved questions of public or great general interest. (See *infra*, page 16, for Argument on Jurisdiction.)

The proceedings in the court below were on appeal by the plaintiffs from adverse judgments of the Common Pleas. Under the Ohio practice, these were trials *de novo* in the Court of Appeals. (*Docket and Journal Entries*, Record 297, page 26; Record 298, page 23.)

The pleadings, on which the cases were tried together in both courts, consisted in Amended and Supplemental Petitions, and in Answers pleading general denials. (Record 297, pages 17-24, pages 25-6; Record 298, pages 12-21, page 22.)

The plaintiffs sought injunctions, under Section 12075 of the General Code of Ohio, providing that "Common Pleas Courts may enjoin the illegal levy or collection of taxes and assessments," and under Section 12077, providing that "Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect them," against the collection by the defendant of certain assessments upon one tract of land belonging to Marianna Matthews, and upon five other tracts of land belonging to Mortimer Matthews, levied by the Commissioners of Hamilton County under an Act of the General

Assembly of the State of Ohio, 106 Ohio Laws 574 (637) and amended 107 Ohio Laws 69 (129), being Section 1214 of the General Code of the State of Ohio, for the improvement of Section X of the Glendale and Milford Road, being Intercounty Highway No. 46, Section X. (*Amd. and Sup. Petitions,* Record 297, pages 17-24; Record 298, pages 12-21.)

Section 1214 is one of the sections of the chapter upon the subject of intercounty highways and is as follows:

"Sec. 1214. Except as otherwise provided in this chapter, the county shall pay twenty-five per cent. of all cost and expense of the improvement. Fifteen per cent. of the cost and expense of such improvement, except the cost and expenses of bridges and culverts, shall be apportioned to the township or townships in which such road is located. If the improvement lies in two or more townships the amount to be paid by each shall be apportioned according to the number of lineal feet of the improvement lying in each township. Ten per cent. of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent. of the valuation of such abutting property for the purposes of taxation. Provided, however, that the county commissioners by a resolution adopted by unanimous vote may increase the per cent. of the cost and expense of the improvement to be specially assessed and may order that all or any part of the cost and expense of the improvement contributed by the county and the interested township or townships be assessed against the property abutting on the improvement; and provided further, that the county commissioners by a resolution passed by unanimous vote may make the assessment

of ten per cent. or more, as the case may be, of the cost and expense of improvement against the real estate within one-half mile of either side of the improvement or against the real estate within one mile of either side of the improvement. Township trustees shall have the same power to increase the per cent. to be specially assessed and to change the assessment area where the improvement is made on their application. The county commissioners or township trustees upon whose application the improvement is made shall cause the county surveyor to make a tentative apportionment of the amount to be paid by the owners of the property specially assessed, which apportionment shall be made according to the benefits accruing to the land so located. The county surveyor shall file such apportionment with the county commissioners or township trustees for the inspection of the persons interested. Before adopting the estimate so made and reported the commissioners or trustees shall publish once each week for two consecutive weeks in some newspaper published in the county and of general circulation in the township where the improvement is located notice that such estimated assessment has been made and that the same is on file in the office of the county commissioners or with the township trustees and the date when objection, if any, will be heard to such assessment. If any owner of property affected thereby desires to make objections he may file his objection to said assessment in writing with the county commissioners or township trustees, as the case may be, before the time for said hearing. If any objections are filed the county commissioners or township trustees shall hear the same and act as an equalizing board and they may change said assessments if in their opinion any change is necessary to make the same just and equitable, and such commissioners or trustees shall approve and confirm said assess-

ments as reported by the surveyor or modified by them. Such assessments when so approved and confirmed shall be a lien on the land chargeable therewith. (107 Ohio Laws, 129, 130.)"

By agreement, the two causes were tried in the Court of Appeals *together* upon the transcript of evidence and exhibits at their trial *together* in the Common Pleas; and one joint and several Bill of Exceptions was allowed and signed, and filed in each of said causes, in the Court of Appeals. *It contains all the evidence offered and submitted to that court.* (*Bill of Exceptions,* Record 297, pages 27-91.)

By stipulation this Bill of Exceptions is printed in the Record of cause No. 297 only. (Record 297, page 92; Record 298, page 24.)

The two judgments of the Court of Appeals, the modification of which is sought, were based upon findings therein, that the Commissioners of Hamilton County, Ohio, were authorized to levy the assessments in question, *that their proceedings were had in conformity to law, and that the assessments were valid;* that said assessments, covering a period of ten years, except so much of the interest included therein, as is in excess of the rate of six per cent. per annum, were a lien on the plaintiffs' real estate respectively; that so much of said interest, as was in excess of that borne by certain bonds, issued in anticipation of the collection of such assessments, was illegal, and by said judgments, its collection was forever enjoined; but the court further found that as to all matters, *except* said excess interest, the plaintiffs were NOT entitled to injunctions, as prayed for by them, and refused to enter decrees therefor. (Record 297, page 26; Record 298, page 23.)

The opinion of the Court of Appeals is printed in the record (Record 297, pages 7-11); but has not been reported.

Among the allegations of the Amended and Supplemental Petitions, at pages 23 to 24 of Record 297, and at page 20 of the Record in cause, No. 298, are the following:

"Said Board of County Commissioners * * * in assessing plaintiff's land not abutting upon the improvement, but upon a parallel County road, and not lying within a half mile thereof by the nearest connecting public roads; and not benefited thereby; and upon an arbitrary plan which was not according to benefits accruing to the same; * * * and in including the value of buildings and improvements in its assessment; * * * acted in each and every one of said specifications without jurisdiction or authority, and all of said assessments on plaintiff's property are illegal and void."

"If said assessments are enforced, plaintiff will be deprived of her (his) property for public use, without compensation and so far as abutting property owners may have been relieved from assessment, for private use, and without due process of law, in violation of her (his) rights as the owner thereof, and in violation, * * * of the Fourteenth Amendment to the Constitution of the United States of America."

The assignments of error, and the evidence and exceptions also involve the question whether the assessments complained of and the construction of Section 1214 of the General Code of the State of Ohio, so as to justify the same, were a taking of the plaintiff's property, and a denial to them of due process of law. (*Assignments of Error*, Record 297, pages 3-4; Record 298, pages 3-4.) [*Specification of Errors, infra*, pages 11-12.]

The tracts of land belonging to the two plaintiffs in error, which are assessed, are described in the Amended and Supplemental Petitions, and appear on two plats. (*Plaintiffs' Exhibits 1 and 10*, Record 297 between pages 90-91.)

They also appear in convenient schedule form in Plaintiffs' Exhibit 3. (Record 297, pages 75-76.) In the Stewart plat (Exhibit 1), they appear below and south of the broken line, which is drawn parallel with Section X, and are identified by the names of the plaintiffs in error respectively. In plat (Exhibit No. 10), also, the various tracts are identified by the names of their respective owners.

These lands of the plaintiffs lie and abut upon a county road situated in a direct line less than one-half mile north of Intercounty Highway No. 46, Section X. They lie within one-half mile of, but do not abut upon the latter, nor upon any connecting road, within a half mile of it by such road. This county road, called Oak Road, is approximately parallel with this Section X of this Intercounty Highway *throughout the entire length of both,* as appears by the Road Map of Hamilton County, at a place marked "Oak" a little west of the northeast corner thereof, south of a line between Glendale and Sharonville. (*Plaintiff's Exhibit No. 9,* Record 297, between pages 90-91.)

None of these lands can use this Section X, except by the intermediate use of from more than half a mile to a mile of the parallel road, on which they abut, and other cross-roads. (*Plaintiff's Exhibit 1 and 10, Testimony J. A. Stewart,* Record 297, pages 30-33.)

The county commissioners on May 11, 1920, adopted resolutions reciting certain initial proceedings, and declaring it necessary to improve THAT PART of this Intercounty Highway, beginning at the point where it intersects Intercounty Highway No. 43, thence east along its route to the point where it intersects Intercounty Highway No. 19, being all in Springfield and Sycamore townships, and comprising a distance of two and fifty-seven hundredths miles, designated and THEREAFTER to be known as Section X of the Intercounty Highway in question. (*Plaintiff's Ex-*

hibit 11, Record 297, pages 82-84; *Gast's Road Map, Plaintiff's Exhibit 9,* Record 297, between pages 90-91.)

These resolutions of May 11, 1920, provided that ten per cent. of the total cost of Section X should be assessed against ALL the real estate within one-half mile of both sides of Section X; and instead of following the express phraseology of Section 1214, and providing that it should be apportioned according to the benefits accruing to these lands, actually and expressly directed the arbitrary division of the amount to be assessed, into three equal parts, one of which parts should be assessed against ALL the property abutting upon Section X IN PROPORTION TO THE NUMBER OF FRONT FEET contained in each part, parcel, tract, and lot abutting thereon; that the second part should be assessed against ALL the property within one-half mile of both sides thereof IN THE PROPORTION TO ITS ACREAGE OR AREA; and, finally, that the remaining one-third should be assessed against ALL the said property IN PROPORTION TO THE TAX VALUATION OF EACH PART, parcel, tract, and lot involved, as the same appears on the tax duplicate of Hamilton County.

The county commissioners afterwards, on May 28, 1920, adopted resolutions, determining to proceed with the improvement, and instead of requiring the county surveyor, under the express phraseology of Section 1214 (*supra* 4) to make a *tentative apportionment* of the amount to be paid by the property owners (*upon his own independent judgment*) according to the benefits to the land to be assessed, expressly directed him to make, by actual view, an "ESTIMATED ASSESSMENT" upon the lands, IN ACCORDANCE WITH THE ARBITRARY PLAN THERETOFORE ADOPTED by the board, by its resolutions of May 11, 1920. (*Plaintiff's Exhibit 11,* Record 297, page 86.)

The board afterward, on June 22, 1920, adopted a resolution, RECITING that the county surveyor had filed an "estimated assessment" against the property lying within one-half mile of either side of Section X, and had proportioned the total amount to be raised by assessing said property IN ACCORDANCE WITH THE PLAN THERETOFORE ADOPTED by the board, and providing that the "estimated assessment", *so made,* be advertised, as notice to property owners. This resolution provided for said publication, without describing the lands lying within one-half mile of Section X, *except as such, and without naming their several owners,* to many of whom, including the plaintiffs, the name, number and section of said intercounty highway, having been but recently given by the resolutions of May 11, 1920, (*supra,* page 7) were, *and must have been,* unknown. This publication was not provided to be made, nor was it made, in a newspaper of general circulation in Springfield and Sycamore Townships, where the improvement was located, as required by the specific terms of Section 1214. It was also authorized and made *after* and not "before" the *real* adoption of the estimate, as required by the same section. (*Plaintiff's Exhibit 11,* Record 297, pages 87-89; *Affidavit of Publication,* Record 297, pages 88-89.)

The plaintiffs had no actual knowledge of the assessments until long after they were made. (*Bill of Ex.,* Record 297, pages 33-4, 49.)

The board afterward, on July 9, 1920, adopted resolutions, fallaciously reciting that the "apportionment", *so made,* was according to the benefits which will result in said real estate; and that no valid objections had been filed thereto, and providing that "said estimated assessment" was thereby approved; and that such parts as should be unpaid, be certified to the county auditor, and placed by him upon a special duplicate, to be collected as other taxes;

and directing the clerk of the board to so certify said assessments; all of which was done. (*Plaintiff's Exhibit 11,* Record 297, page 90.)

The work upon the improvement was not begun until several months after the commencement of these suits, and the obtaining of preliminary restraining orders against the collection of the assessments. (*Bill of Exceptions,* Record 297, page 54.)

The county commissioners, in assessing one-third of the amount to be assessed in proportion to the tax valuation of each part, parcel, tract, and lot involved, as the same appears on the tax duplicate of Hamilton County, included therein, as a positive factor, and in a definite inflexible ratio, not only the tax value of the land itself, as valued for taxation, but also that of the buildings thereon as separately appraised, and separately extended upon the tax duplicate of Hamilton County. (*Plaintiffs' Exhibit 11,* Record 297, page 83; *Testimony W. H. Meinhardt,* Record 297, pages 40-46.)

SPECIFICATION OF ERRORS.

The errors relied upon are shown by the Assignment of Errors (Record 297 and 298, pages 3-4), and are as follows:

First. The plaintiff's lands, which were assessed, lie and abut upon a county road approximately parallel with the improvement, throughout the entire length of both, and lie, in a direct line, within one-half mile of, but do not abut upon the improvement, nor upon any connecting road, within one-half mile by such road, whereas other assessed lands, not abutting upon the improvement, nor upon said parallel county road, abut upon other connecting roads at a very much shorter distance from said improvement, or have access thereto, over other abutting lands of the same owner, at very much shorter distances. As the apportionment above described omitted to take into account either the factor of direct distance, or that of distance of access, which are those, without which no valuation of relative benefits could have been made, as between the plaintiff's lands and said other assessed lands not abutting upon the improvement, but lying much nearer and having much nearer access thereto, said assessments and their justification under said section 1214, result in the deprivation of the plaintiff of her (his) property without due process of law.

Second. Some of the plaintiff's property, more distant, as it is, than other non-abutting and also abutting property, was of higher tax valuation, and had upon it buildings of much greater tax valuation than some of either of the latter. It was upon a wrong and plainly arbitrary principle, and a deprivation of the plaintiff of her (his) property without due process of law, to include, as a factor in the valuation of relative benefits, in a definite inflexible ratio, either the value of bare land, or buildings, without reference to distance, whether direct, or by means of access, or the value of buildings, at all, as a part of the value of lands.

Third. All of the plaintiff's property abutting, as it did and does, upon a county road approximately parallel to the improvement throughout the entire length of both, had and has no need of the improvement as a means of access. As the value of the plaintiff's land depends wholly upon its own direct means of access thereto, it owes none of its value to the road for the improvement of which it has been assessed, and has received therefrom, no particular or special benefit, to any extent whatsoever, within the meaning of such, as under section 1 of the Fourteenth Amendment to the Constitution of the United States, local assessments may be levied; between which and common or general benefits, there is a wide distinction, the same for the assessment of special benefits as for damages. The assessment of plaintiff's lands, in any sum whatsoever, and the justification thereof under said section 1214, results in the deprivation of the plaintiff of her (his) property without due process of law, within the meaning of the terms of said Constitutional provision.

ILLUSTRATIONS.

We append here some illustrations of the way these "irrational irregularities", as we claim them to be, work out in detail, in dollars and cents, from the assessment book and the assessment roll, as testified to by William H. Meinhardt, Deputy Auditor (Record 297, pages 36-48), and from distances scaled from plaintiffs' Exhibits 1 and 10 and from data taken from plaintiffs' Exhibits 12 and 13, and 3 and 5. (Record 297 between pages 90-91; Record 297, pages 75 and 76.)

They may be regarded as an *appendix,* not to be noticed, until the argument has been apprehended, or may be glanced through here, as showing the seriousness of our claims, and therefore as anticipatory of their merits.

(a) Archbishop Moeller's 9.21-acre tract (Plf. Ex. 10), not abutting on Section X, but on the intersecting Lockland road, the center of whose front, by scale, is about 1,100 feet by road from Section X, is assessed a total of $79.26, or $8.06 per acre. ON THE OTHER HAND, the Mortimer Matthews 5.96-acre tract, the center of whose front on Oak road is distant 4,400 feet by road from Section X, is assessed a total of $47.89, or $8.04 per acre—an allowance of two cents an acre on account of four times the PRACTICAL distance. And this is to say nothing of the quite apparent fact, that it is about three times the distance in a direct line, through which it has no access to Section X, while the Moeller 9.21-acre tract does have such direct access, through the 10-acre tract belonging to the same owner. Neither of these properties is assessed upon any building value. (Record 297, page 39; *Exhibits 1 and 10.*)

(b) Archbishop Moeller's two tracts of 7.68 and 6.14 acres, 13.82 acres in all, bordering on the west side of the canal (Exhibit 10), not abutting on Section X, as changed by the new curve, (Plf. Ex. 1) whose front line, however, has access thereto, through his own land in the new curve, at a distance of 400 feet, are assessed for the two parcels, a total amount of $79.19, or $5.73 per acre. ON THE OTHER HAND, the Mortimer Matthews 59.97-acre tract, twice as far as these, even in a direct line, through which it has no access, and having no actual access from the central point of its front on Oak road, except VIA 4,400 feet of parallel and intersecting roads, is assessed a total of $485.73, or $8.10 an acre. Eleven times the distance of practical access, and more than one and a half times the assessment. This "irrational irregularity" is somewhat affected by the factor of tax valuations on buildings, for that on the Moeller

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(Note—The above 6.14-acre tract is misprinted 6.32 on the plat, Exhibit 10.)

tracts is $670.00, while that on the Matthews tract is $850.00. (Exhibits 12 and 13.) (Record 297, pages 38 and 42.)

(c) Archbishop Moeller's six tracts, separated from Section X by only the varying breadth of other land of his, thrown by the new curve (Plf. Ex. 1) from the south to the north side of Section X, the greatest width of which is about 400 feet, are shown on Exhibit 10, beginning at the west, as being tracts of the following dimensions: 7.55, 7.67, 7.68, 6.14, 9.21, and 10 acres in extent—in all 48.27 acres. They are assessed a total of $502.37, or $10.40 per acre. ON THE OTHER HAND, the Mortimer Matthews 44.07-acre tract, approximately the south half of his 87.59-acre tract (Exhibit 10), distant an average of four times as far in a direct line, by which it has no access, and an average of six or seven times as far by road, is assessed a total of $484.10, or $10.98 per acre—a concession to the Moeller tracts of fifty-eight cents per acre on account of the inconvenience of being that much nearer the improvement. The assessment pretends that the Matthews tract has been benefitted fifty-eight cents an acre more than the Moeller tracts. To be sure the Matthews tract contained valuable buildings at the time of the assessment, much more valuable than those on the Moeller tracts, AT THAT TIME, but there was nothing to prevent the Archbishop from erecting immediately thereafter institutional buildings many times more valuable. Beside this the Matthews land and its buildings owed their value, either for use or sale, wholly to the access furnished by their own Oak road and not in any degree to Section X. If Oak road were not there, the Matthews land and buildings, unless owned by Archbishop Moeller, would be practically worthless. (Record 297, pages 39, 41, 42; *Plaintiffs' Exhibit 4*, Record 76-78; *Plaintiffs' Ex. 10.*) See Note to **(b)** (*supra*).

(d) Archbishop Moeller, on his 152.95-acre tract, on which there are buildings of a taxable value of $3,050, and of a total tax value, land and buildings, of $19,100, and *abutting* on the improvement, is assessed a total of $3,459.79, or $22.62 per acre. ON THE OTHER HAND, Marianna Matthews, on her 7.10-acre tract, of a total value for land and buildings of $8,080, situated almost half a mile in a direct line from the improvement, and having no access thereto, except by more than three-quarters of a mile by road, is assessed a total amount of $239.28, or $33.70 an acre. Her land is asserted to have been benefitted $11.08 more per acre than Archbishop Moeller's abutting lands. The higher valuation for taxation of her buildings situated for all practical purposes nearly a mile from the improvement, it is pretended, justify a fifty per cent. higher assessment than on *abutting* lands with their *nearby* buildings, having direct access to the improvement. (Record 297, pages 41-2, Plf. Ex. 12.)

(e) Archbishop Moeller's tract of 7.68 acres bordering on the west side of the canal (Exhibit 10), not abutting on Section X, whose south or front line, however, has direct access thereto, through his own land, at a distance of about 1,000 feet, of a total value upon the exempt duplicate of $50.00 (Plf. Exhibit 12), is assessed $8.13 or $1.06 per acre. ON THE OTHER HAND, the Marianna Matthews 7.10-acre tract, of a total value for land and buildings of $8,080, situated almost half a mile in a direct line from Section X, and having no access thereto, except by 4,500 feet by road, is assessed a total amount of $239.28, or $33.70 per acre. Here is an assertion that her 7.10-acre tract is benefitted nearly thirty-two times as much as the Moeller 7.68-acre tract. As the area is nearly the same, this very violent assumption is due solely to the higher valuation of land and buildings, ignoring entirely the factor of access and dis-

tance—more than twice the direct distance, and four and a half times the distance of access as against nearly thirty-two times the pretended benefit and the assessment.

Situated as it is, *not* on Section X at all, but upon a *parallel* road, this 7.10-acre tract is the highest assessed property in the entire assessment.

ARGUMENT.

I. JURISDICTION.

The judgments of the Court of Appeals are those of the highest court in the State of Ohio having jurisdiction to hear these suits upon these alleged constitutional questions.

It is provided by the Judicial Code, Section 237, that "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute, or an authority exercised under any state, on the ground of their being repugnant to the constitution * * * and the decision is in favor of their validity, may be reexamined and reversed, or affirmed in the Supreme Court upon a writ of error."

The Constitution of the State of Ohio, Article IV, Section 2, provides first, that the Supreme Court of Ohio shall have "appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state"; and second, that "in cases of public or great general interest the Supreme Court may within such limitation of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review and affirm, modify or reverse, the judgment of the Court of Appeals."

The plaintiffs brought proceedings in error, as of right, in the Supreme Court of Ohio on these and other constitu-

tional grounds. They were dismissed on the sole ground that the records herein did not present any debatable constitutional question. The plaintiffs did not file motions for orders directing the certification of these records on the ground that the cases were of public or great general interest.

The question of jurisdiction is whether or not the latter course was necessary to give this court jurisdiction, in view of the fact that the former course had been taken.

The case of *Stratton* v. *Stratton*, 239 U. S. 55, might seem to require an affirmative answer, unless distinguished. By the report of that case, it does not appear that the plaintiff in error therein had essayed to bring proceedings in error as of right. This court said that it was invited to assume jurisdiction by exercising an authority which it had not, "that is by indulging in conjecture as to what would or would not have have been the judgment of the Supreme Court of Ohio, if it had been called upon to exert the discretion vested in it by state laws." This seems to be the ground upon which that decision is based, because the court added "When the significance of the proposition, upon which the claim of jurisdiction is based, is *thus* fixed, it is not open to contention, as it has long since been adversely disposed of." This ground does not exist in the cases now before the court. There can be no conjecture here as to what would or would not have been the judgment of the Supreme Court of Ohio, because it has decided that no debatable constitutional question is presented by these records. It could not possibly have directed their certification because of public or great general interest. Where there is no question at all, or no debatable question, it can not possibly be of public or great general interest. The decision of the one is inclusive of the decision of the other.

Again, at the time the Supreme Court of Ohio dismissed the proceedings in error, and thus decided it had no appellate jurisdiction upon the constitutional questions alleged, the time had long since expired, within which it had discretionary jurisdiction to direct the certification of the records on the ground of "public or great general interest." It is only "within such limitation of time as may be prescribed by law", that it was given this discretionary jurisdiction. After seventy days, which is the limitation prescribed by the court itself, in *Akron* v. *Roth*, 88 Oh. St. 457, all questions, which had been before the Court of Appeals were excluded, except the alleged constitutional questions, pending on error, brought as of right. It was not until the dismissal for lack of such jurisdiction, that *it became the law of these cases*, that the Court of Appeals was the highest court, in which a decision on these segregated constitutional questions could be had. This dismissal was the cause, by which alone finality can be attributed to the judgments of the latter court, on the *only* questions which can be brought to this court. Our contention, therefore, that its judgments upon the federal questions thus segregated, were final judgments, "susceptible of being here reviewed by writ of error", *do not* "rest upon the impossible assumption", that their finality "existed before the happening of the cause, by which alone finality could be attributed to them." These judgments thus susceptible of being reviewed here were *not open at the same time* to the power of the Supreme Court of Ohio to review and modify. It is *thus* we distinguish *Andrews, Admx.* v. *Virginian Railway Co.*, 248 U. S. 272.

The situation is what it would be, if the statute law of Ohio were such, that the decisions of the Court of Appeals on constitutional questions were final, and that the Supreme Court had discretionary appellate jurisdiction, on all *other*

questions of public and great general interest. In such case, there could be no doubt, that this court would assume jurisdiction. Can it make any difference, that the situation is created by an act of the Supreme Court, as the law of these cases, and not by an act of the legislature, as the law for all? We think not.

Finally, if this court shall decline to entertain jurisdiction, it will certainly tend to increase the efficiency of this two-fold jurisdiction of the Supreme Court of Ohio, as a trap, not only for the merely unwary, but also, and all the more, for those who like ourselves, as may be seen by an examination of the merits, had every reason to believe they had at least a debatable constitutional question, *even* in that court. We realize completely, that this court does not gratuitously seek opportunity to review the judgments of state courts. It remains nevertheless, that it is solemnly charged by the Fourteenth Amendment with the protection of citizens of the United States against aggresive state action. Under a variety of circumstances, it has previously prevented its jurisdiction so to do, from being incidentally defeated by state laws, whether designed, or not, for such a purpose, especially in cases, where the repugnancy to the constitution was clear, as we claim it to be here.

Myles Salt Co. v. *Iberia Drainage District,* 239 U. S. 478.

Gast Realty Co. v. *Schneider Granite Co.,* 240 U. S. 55.

See also,

Thornton v. *Road Imp. Dist.,* 291 F. 518, 527-530.

If the point is made, that there is no jurisdiction, in a Court of Equity, to hear these questions, because the plaintiffs did not file objections before the county commissioners, as an equalizing board, under Section 1214, the authorities

immediately above cited meet the point. The kind of notice given, and the fact, that the plaintiffs had no actual knowledge, are sufficiently detailed *supra* page —. Furthermore, if the point is otherwise well taken, the findings of the Court of Appeals, and its judgment upon the merits exclude the question. That question could not have been preserved for decision here, except by a dismissal by the Court of Appeals for lack of jurisdiction, or some such equivalent action.

II. DISTANCE OF ACCESS.

Acting, as they supposed, and as has been held by the Court of Appeals, under Section 1214, the county commissioners by resolution divided the total amount to be assessed, $15,607.15, into three equal parts of $5,202.38, one of which they apportioned to all of the lands abutting on the improvement according to frontage, another to all of the lands within one half mile of the improvement, according to acreage or area, and the last to all the same lands according to their tax valuation for land and the buildings thereon, as the same appear on the tax duplicate of Hamilton County.

The plaintiffs' lands, which are assessed, all lie and abut upon a county road situated in a direct line less than one-half mile north of said improvement, and lie within one-half mile of, but do not abut upon it, nor upon any connecting road, within a half-mile by such road. This county road is approximately parallel with the improvement throughout the entire length of both. None of the plaintiffs' lands can make any use of the improvement, except by the intermediate use of from more than a half mile to a mile of the parallel county road on which they abut, and other intersecting roads. They are assessed nevertheless at the *same* rate per acre, and at the *same* rate per dollar of tax valuation for land and buildings, as other lands, not

abutting upon the improvement, but lying within a few hundred feet thereof, upon said intersecting roads, and within less than a quarter of their distance therefrom by direct line, by which some of them have access thereto, through other abutting lands of the same owner. The resolution establishing these assessments was held to follow Section 1214 of the General Code of Ohio, and to be consistent with the Fourteenth Amendment by the Court of Appeals.

The resolution, following the statute *as construed,* so far as lands not abutting on the improvement are concerned, totally ignored the factor of distance, either in a direct line or of access, and as applied to the higher tax valuation of the land and buildings of the plaintiffs at a considerably greater distance from the improvement than other land and buildings quite near the same, disclose many gross inequalities.

See illustrations **(a)**, **(b)** and **(c)** *supra* 13-14.

The apportionment was not based upon any consideration of difference in the benefits conferred, but was established mechanically in obedience to the *criteria* that the resolution directed to be applied. The plaintiffs' case is not an incidental result of a rule, that, as a whole, and on the average, may be expected to work well, but of a resolution that, in result, is "a farrago of irrational irregularitites throughout." It is enough that the resolution, following the orders of the statute, *as construed,* is bad upon its face, as distributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that requires the result. And it can not be said, that the resolution as a whole, may be regarded as an individual exception under a rule that promises justice in all ordinary cases. The provisions of the statute as applied to a county like that of

Hamilton, must be taken to contemplate such resolutions, under the construction given to it by the Court of Appeals.

It is apparent that we allege the facts to be analogous in principle, to those under consideration in a recent case decided by this court, and assert, that these cases are governed by the rule laid down in that.

Gast Realty Co. v. *Schneider Granite Co.*, 240 U. S. 55.

That rule briefly stated is, "A law establishing a taxing district, under which there is no reasonable presumption that substantial justice will be done, but under which parties will probably be disproportionately taxed, can not stand as constitutional against one actually so taxed."

The only SUGGESTION of the valuation of relative benefits in this plan, is that abutting property is subject to all three of the assessments, and other property to only two; but this is an entirely arbitrary treatment, as between even these two classes of property. And it is entirely insufficient, because leaving out of account the very apparent difference between non-abutting property situated near the improvement, and benefitted very little less than abutting property, and non-abutting property lying much more distant, and benefitted little, if any. It would seem, that, as applied to such situations, this three-way average is not merely inadequate, but palpably arbitrary. The resolution could not have become, *even debatably*, a rule to aid in producing equality and uniformity, as applied to the plaintiffs' lands, except by amendment of its last two factors, so as to read in some such way, as appears within brackets, as follows:

" 'That the second part thereof shall be assessed against all property coming within the purview of said improvement in proportion to the acreage or area thereof,' [EXCEPT such property as abuts upon parallel or intersecting roads, at a distance by said road or roads of more than one-

half mile from said improvement, UPON WHICH THERE SHALL BE ASSESSED only fifty per cent. or less, thereof, upon a sliding scale of percentages, depending in inverse ratio, upon its average distance, that is, the distance, of its approximately central point, by said road or roads from said improvement.'']

"'That the remaining one-third of said assessment be assessed against all the property coming within the purview of said improvement in proportion to the tax valuation of each part, parcel, tract and lot involved as the same appears on the tax duplicate of this county,' [EXCEPT such property as abuts upon parallel or intersecting roads, at a distance by said road or roads of more than one-half mile from said improvement; UPON WHICH THERE SHALL BE ASSESSED only fifty per cent. or less of that otherwise attributable to its bare land tax valuation, upon a sliding scale of percentages, depending, in inverse ratio, upon its average distance, that is, the distance of its approximately central point, by said road or roads, from said improvement; and UPON WHICH THERE SHALL BE ASSESSED only fifty per cent. or less of that otherwise attributable to the tax valuation of the buildings thereon, upon a sliding scale of percentages, depending, in inverse ratio, upon the distance of each building, by said road or roads, from said improvement.'']

These suppositious amendments do not pretend to cover the whole ground. They are intended merely to point out one fatal omission. Good so far as they go, they are suggested by what the Supreme Court of Ohio said in a recent case, wherein it was held that such rules of apportionment, as applied to established facts and situations, are either reasonable, or not, *as a question of law.*

Conservancy Dist. v. *Ryan*, 104 O. S. 79-81, 87-89.

In order to call attention to the fact, that the hearty commendation that court gave the rule in *Conservancy District* v. *Ryan*, can not be made applicable to the arbitrary plan of apportionment here, but in reality supports our contention, we quote, beginning at page 80, as follows:

"The basis of the assessment was the fair value of the property as of a date just prior to the 1913 flood, and the assessments were to be calculated by a COMPREHENSIVE system of percentages in which all properties which had been inundated to a depth of more than thirteen feet would bear the maximum assessments, and all other properties would be assessed upon a SLIDING SCALE OF PERCENTAGES DEPENDING UPON THE DEPTH OF INUNDATION, in which MANY COLLATERAL FACTORS were to be considered, * * * and it is sufficient to say that the plan was a very comprehensive one and ADMIRABLY COVERED A GREAT VARIETY OF CONDITIONS."

The court continues at page 88 to further commend this "flooding factor" plan, as it is called at that place.

What the county surveyor should have had for Section X, was a "distance" or "access factor" plan, in order to have made a real apportionment according to benefits. Our assertion is that distance of access here is, in inverse ratio, analogous to depth of inundation there. That court held the "flooding factor" plan as a question of law reasonable there; and with equal reason, we submit, this court should hold the omission of a "distance factor" unconstitutional here, as it did the omission of an "equal depth" factor in *Gast Realty Co.* v. *Schneider Granite Co.*

In addition, however, to these cases, we beg to cite several other directly pertinent authorities:

State v. *Brill*, 58 Minn. 152, 156-7-8.
Appeal of Piper, 35 Cal. 530.

Ry. Co. v. *Road Imp. Dist.*, 256 U. S. 658, 659-661.
People v. *Syracuse*, 63 N. Y., 291, 300.

State v. *Brill* (*supra*) is a most enlightening case, as applied here. The facts were that a proposed park having been established on the southerly point of a bluff, the "assessment district" to be assessed for benefits, extended from the park north about a mile and a quarter. The board of public works divided this district into several sections or subdistricts, divided from each other by east and west lines—each subdistrict being about one-half mile wide from north to south—and assessed every lot within a particular subdistrict the same amount regardless of their relative distances from the park. It was held, that, in thus appraising the benefits to the respective lots, the board adopted *an arbitrary and illegal rule.*

The court said: (158) It is *self-evident* that these benefits are, in a great degree, *in proportion to the proximity of the property to the park—the benefit diminishing as the distance increases.* Now, the law does not require absolute equality in taxation, but only equality as near as practicable. Hence, it is not required that the board, in making these assessments, should graduate them uniformly, in exact proportion to distance, as the ATMOSPHERE GRADUALLY SHADES OFF INTO SPACE. This is altogether impractiable. But they must make the assessment uniform in proportion to benefits, as near as reasonably practicable. This they did not do in this case. It is perfectly evident that, to SAVE LABOR, they adopted an ARBITRARY AND INFLEXIBLE basis of assessment in each of these subdistricts; assessing every lot in it exactly the same amount, in utter DISREGARD OF ITS DISTANCE from the park. Take, for example, the first subdistrict north of Burns avenue, which was half a mile wide from north to south—how long from east to west does not clearly appear.

A lot on the extreme south side of this subdistrict was assessed $7.20, exactly the same as a lot on the extreme north side—although the latter was half a mile further from the park than the former. The same is true of the next subdistrict, and so on. Moreover, two lots lying side by side and consequently practically equally distant from the park, if divided by an imaginary line between two subdistricts, would be assessed, one $7.20 and the other $3.60, or one $3.60, and the other $2.50, as the case might be. * * * Such an *arbitrary system* of apportioning * * * can not be sustained."

In the Appeal of Piper, (*supra*) the court say, in regard to one of the questions at issue therein, as follows:

(532) "ON THE CROSS STREETS, THE RATE OF ASSESSMENT DIMINISHED FOOT BY FOOT AS THE DISTANCE FROM KEARNEY INCREASED. On some of the principal cross streets, this rate or scale COMMENCED AT ELEVEN DOLLARS PER FRONT FOOT; on others, when the grade was steep or the street narrow, and consequently the benefit less, this scale of eleven dollars WAS DIMINISHED IN PROPORTION, in some cases one-third, in others one-half, etc."

(551) "It is ARGUED that if the apportionment on Kearney street is made upon a correct principle, then the apportionment on Third street, and the cross streets within the district determined to be benefitted, which was made upon a different hypothesis, must necessarily be erroneous. BUT THIS CONCLUSION DOES NOT NECESSARILY FOLLOW. These streets occupy an entirely different relation to the improvement."

In *Ry. Co.* v. *Road Imp. Dist.*, 256 U. S. 658, this court, Mr. Justice Mc Reynolds, delivering the opinion, at page 660, said:

"The assessors made estimates as to farm lands and town lots according to area and *position* and wholly without regard to the value of the improvements thereon, or their present or prospective use. On the other hand, disregarding both area and position, they undertook to estimate benefits to the property of plaintiffs in error without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would enhance its value, considered as a component part of the system."

The application of what is last quoted, lies in this, that the assessment of which we complain utterly disregards the POSITION of our property, EXCEPT SO FAR AS IT IS NOT ABUTTING PROPERTY.

In *People* v. *Syracuse,* 63 N. Y. 291, it is said at page 300:

"In ascertaining what the relative benefit is to different parcels of land, the SITUATION of the different lots * * * *whether access to them is needed* * * * may properly be regarded by the commissioners."

III. VALUE.

It was palpably arbitrary for these assessments to *include* in a definite inflexible ratio, as a factor in an appraisement of benefits of the plaintiffs' lands—(1) the value of bare land or buildings, without reference to their distance of access from the improvement;—or (2) the value of even bare land upon a parallel road,—or (3) the value of buildings, as a part of the value of lands.

(1) That the value of land and buildings, *without reference to distance,* was arbitrary, need not detain us. That is really a question of access and distance, and has been sufficiently argued. It is mentioned here, merely the more

sharply to give point to the second and third branches of the proposition; to bring the entire subject of value into one comprehensive proposition.

(2) It was palpably arbitrary to include, in a definite and inflexible ratio, even the value of bare land itself, not abutting on Section X, and therefore not owing any part of its value thereto, but owing its value wholly to a parallel road upon which it was situated.

It is only when values DEPEND upon a road to be improved, and vary acordingly as the road exists or does not exist, or becomes impassable, or is improved, that they may be used at all, in whole or in part, as a definite measure of the presumably increased benefits accruing from its improvement. The value even of bare land has never been taken as a *definite* measure, of benefit, *except upon abutting lands.*

See illustration **(c)** *supra* 14 and remarks appended thereto.

Thornton v. *Road Imp. District,* 291 F. 518.
Fidelity Nat. Bank v. *Trust Co.,* 2 F. (2nd) 676.

If it be said, or thought, that this branch of the argument and these authorities go too far, that is, that they support a proposition that land on a parallel road is *not assessable at all*—we answer that they do.

We do not argue the more comprehensive proposition except incidentally, not being necessary to an injunction against these assessments, but only to an injunction against any re-assessment at all, of the plaintiffs' lands.

If this court should approve these decisions of the Circuit Court of Appeals, Eighth Circuit, that final action is what, of course, we desire to accomplish.

If we are right in saying that this land upon a parallel road is not assessable at all, the cases come within the rule

in *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478, *and are of very simple* solution.

(3) It was palpably arbitrary to include the value of buildings at all, as part of the value, upon which the definite and inflexible ratio of one-third of the assessment was levied.

See illustrations (c), (d) and (e) *supra*, pages 14-15.

Buildings are not enhanced in value even by improvements upon which they abut. A building is worth no more than it will cost to put another there like it, and the net rent over wear and tear, during the time required to erect it. Immediately after an assessment the building may be destroyed by fire. If insured the proceeds are personal property, not real estate, and may never go back into a new building. Provisions are made in the statutes of Ohio in such cases, for deducting the tax valuation of buildings from the tax duplicate. This is the reason for the separate valuation of the bare land and the buildings on those books. At the time of assessment like these, one owner may be assessed upon bare land worth $1,000.00, and a building thereon worth $5,000.00, total $6,000.00. His next neighbor may be assessed only upon an equal tract of bare land worth $1,000.00. The next week the building may burn down; and his next neighbor may begin the erection of a building worth $5,000.00, total $6,000.00. The former, however, pays an assessment on $6,000.00, and the latter on $1,000.00 only. This seems like a somewhat dry piece of humor. It is the bare land alone which receives the benefit, and is enhanced in value. It is the bare land which receives the benefit of the OPPORTUNITY to turn farm property, say, into suburban residences. By using such opportunity, expensive farm buildings might become a total loss. Any buildings, farm or residence, will cost very nearly if not quite the same without as with the improvement, unless in-

deed it is an entirely new road, giving access where before there was none. It is the bare land's "POTENTIALITY of receiving a benefit", and *"its adaptation to uses which would be promoted by the improvement"*, which are the things to which consideration is to be given. It is a very different thing to levy an assessment one-third according to value of land and PRESENT improvements only.

People v. *Syracuse*, 63 N. Y. 291.
See *Wright* v. *Boston*, as cited in *Snow* v. *Fitchburg*, *infra*.

It was in utter disregard of all this, to assess the Marianna Matthews tract of 7.10 acres on about $7,500.00 of then PRESENT buildings, and the Mortimer Matthews tract of 44.07 acres, on about $4,600.00 of then PRESENT buildings, without taking into account with equal effect the "potentiality" of Archbishop Moeller's land becoming the site for the buildings of a great institution, and that the improvement of Section X might promote its "adaptation" to such valuable uses. This is by way of argument merely to show that neither the highly valued then present Matthews buildings, nor the low valued then present Moeller buildings should have cut any definite figure at all in the assessment; that they had nothing to do with the case; that the land on which they stood should have been "considered simply in its general relations and apart from its particular use at the time"; and that the assessment, so far as it brought into account, in definite ratio, the value of then present buildings, was upon a wrong principle.

Railroad Co. v. *Barber Asphalt Co.*, 197 U. S. 430.

See illustrations **(c)**, **(d)** and **(e)** *supra* 14-15.

The proposition, and the reasons on which it is based, are directly supported by the authorities. Some of them go further; but it may, at least, be gathered from them, as

a whole, that the value of buildings in a definite inflexible ratio, as in this case, may not be used as a factor in arriving at a proper appraisal of benefits.

Appeal of Piper, 32 Cal. 530, 553-4.
Snow v. *Fitchburg,* 136 Mass. 183, 184.
Peters v. *Newark,* 2 Vroom 360, 361, 364.
Hoffield v. *Buffalo,* 130 N. Y. 387, 393.

In the *Appeal of Piper,* cited also above under another point, the court further decided, that the benefits resulting from the widening of a street accrue to the owner through his estate in the land, whether the estate be a fee or a leasehold, and not through the buildings thereon, and that *the enhancement in value accrues to the land, not to the buildings.*

The court, at page 554, said:

"The land in the strictest sense of the term, is the only thing of a permanent character. It can not be removed, enlarged, diminished, or destroyed, and we do not see why the benefit should not all be regarded as accruing to the land alone. It is so regarded in theory by writers upon political economy. Adam Smith says," etc., • • • (quoting).

(555) "Thus that profound thinker arrives at the same conclusion upon this subject that the commissioners in this case—three practical business men—attained, after investigating the subject in a practical way, and which, it seems to us, *must be attained by every reflecting mind. It would seem that it must be so from the nature of things.* How could it be possible that a building, wherever situate, should be worth any more than it would cost to put another there like it, and, say, the rent, or that portion of the net rent over wear and tear, during the period of time required to erect it and put it in a condition for occupancy? • • •

If any value accrues in consequence of changes in the surrounding circumstances, it necessarily attaches to the land —to the location. Should the building be destroyed by fire, the land would sell for as much without it as with it, less the cost of erecting another like it and the net rents during the period required to put it in a condition to occupy: in practice, probably for more."

In *Snow* v. *Fitchburg*, 136 Mass. 183, the court, at pages 183-4, said:

"The ruling that the assessment should be made according to the value of the land exclusive of buildings, was in accordance with the decisions of this court. *Boston* v. *Shaw*, 1 Met. 130; *Downer* v. *Boston*, 7 Cush. 277; *Wright* v. *Boston*, 9 Cush. 233."

"The tax is not to be assessed according to the immediate necessity for drainage, but according to the opportunity for drainage when the owner may require it. As said in *Wright* v. *Boston, ubi supra*, 'The potentiality of receiving a benefit from the sewer was the thing to be charged with the tax.' It would be manifestly unjust, in making an assessment for a sewer, to value a lot worth $500, with a house upon it worth $5,000, at $5,500, and to value an adjoining lot of the same size and value, but vacant, at $500, when within a few months the owner of the vacant lot might build a house upon it of greater value than the house on the adjoining lot, and require and enjoy facilities for drainage."

In *Peters* v. *Newark*, 2 Vroom 360, the court, at page 364, said:

"The advantage an owner of property acquires by the opening of a new street in a city, must be plainly if not wholly the advanced value of the land. The buildings on it will cost very nearly or quite the same without as with the improvement."

In *Hoffield* v. *Buffalo*, 130 N. Y. 387, the court, at page 393, said:

"It is, however, urged that the assessment was made upon a wrong principle and is for that reason illegal. * * *. The assessors did not fail to consider the improvements on the lands, and having determined that the amount of benefits was not affected by them, assessed it upon the lots respectively without regard to the value of the buildings. This was not in violation of the rule embraced within the reason given in *Kennedy* v. *City of Troy* (77 N. Y. 493), for decision in *Clark* v. *Village of Dunkirk* (12 Hun. 182, 75 N. Y. 612). And was in harmony with the views of the court upon which *O'Reilley* v. *City of Kingston* (114 N. Y. 439), was determined. The facts so found do not show that the assessors proceeded on a wrong rule of law in making their estimate of the benefits to the lands assessed."

CONCLUSION.

It is submitted, that the court should entertain jurisdiction of these cases, and review the judgments of the Court of Appeals, and that upon the merits, it should find the assessments complained of repugnant to the due process clause of the Fourteenth Amendment, in omitting the consideration of the factor of distance of access, in including the value of land upon a parallel road, and the value of buildings as a part of the value of lands, and finally in assessing any of the plaintiffs' lands, all lying upon a parallel road, to any extent whatever, and modify the judgments of the Court of Appeals accordingly.

Respectfully submitted,

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Plaintiff in Error,
and
Pro se.

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WM. R. STANSB
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Supreme Court of the United States

Nos. 297 and 298.

OCTOBER TERM, 1924.

MARIANNA MATTHEWS,

Plaintiff in Error,

(30144) vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

MORTIMER MATTHEWS,

Plaintiff in Error,

(30145) vs.

LOUIS J. HUWE, as Treasurer of Hamilton County, Ohio.

In Error to the Court of Appeals for the First Judicial District of the State of Ohio.

ADDENDA TO BRIEF FOR THE PLAINTIFFS IN ERROR.

MORTIMER MATTHEWS,
Counsel for Marianna Matthews,
Plaintiff in Error,
and
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Supreme Court of the United States

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ADDENDA TO BRIEF FOR THE PLAINTIFFS IN ERROR.

The plaintiffs in error desire to add to their brief the following citations:

(1) Near the top of page 19, before the paragraph beginning with the word "Finally", we insert a paragraph containing citations, and a discussion making application of them to the cases before the court, as follows:

In *Hetrick* v. *Village of Lindsey*, 265 U. S. 384, this court entertained jurisdiction to review a judgment of the Su-

preme Court of Ohio, which dismissed, as frivolous, a petition in error to review a judgment of the State Court of Appeals. In order to have adjudged in accord with the rule in *Norfolk Turnpike Co.* v. *Virginia,* 225 U. S. 264, this court must have held the judgment there reviewed, to have been *plainly* not a dismissal for lack of jurisdiction, but an affirmance of the judgment below, upon the merits, and therefore a final judgment in the suit, for a review of which it had jurisdiction under Section 237 of the Judicial Code. There were, however, in that record, as in this, other questions, which were not constitutional; and there was no attempt, as also here, to bring them up to the Supreme Court of Ohio, by a motion to certify the record. It equally did not appear but that, if properly invoked, the Supreme Court of Ohio might have exercised its discretionary jurisdiction, and might have reviewed the State Court of Appeals upon these other questions. Notwithstanding this fact, this court entertained jurisdiction to review that judgment, confined as it was, to the constitutional questions only. By its action here, which is plainly not an affirmance, but a dismissal for lack of jurisdiction, the Supreme Court of Ohio did, in fact, make the judgment of the Court of Appeals no less final, than its own in *Hetrick* v. *Village of Lindsey.* It is here, no more, and no less than there, an open question, whether or not the Supreme Court of Ohio might have exercised its discretionary jurisdiction, and have reviewed the Court of Appeals, upon such other questions. It is difficult to see how the failure to invoke the discretionary jurisdiction *there* did not prevent finality, but would do so *here.* If this analysis of that case is correct, it would seem to be conclusive.

(2) Near the foot of page 19 in connection with the cases there cited, we also cite the case of *Baltimore R. Co.* v. *Sixth Presbyterian Church,* 19 Wall. 62.

(3) At the end of the paragraph near the top of page 20, we cite the following cases: *Bi-Metallic Co.* v. *Colorado*, 239 U. S. 441, 444; *Bashore* v. *Brown*, 108 Oh. St. 18; *Davis* v. *Wechsler*, 263 U. S. 22; *Hetrick* v. *Village of Lindsey*, 265 U. S. 384, 387.

(4) In connection with the reference to *Gast Realty Co.* v. *Schneider Granite Co.* (240 U. S. 55), near the foot of page 24, we cite also *Schneider Granite Co.* v. *Gast Realty Co.*, 245 U. S. 288.

Respectfully submitted,

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